International Brotherhood of Painters and Allied Trades, Painters Local Union No. 1115, AFL–CIO. (C & O Painting) ***and*** **Nick Hernandez.** Cases 32–CB–3829 and 32–CB–3869

October 12, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 25, 1993, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We find it unnecessary to rely on the judge's discussion of the qualifications of Albert Hu, a member of the Respondent on the out-of-work register.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Brotherhood of Painters and Allied Trades, Painters Local Union No. 1115, AFL–CIO, Stockton, California, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Jeffrey Henze, Esq., for the General Counsel.
David Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), for the Respondent.
Nick Hernandez, for himself.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which I held a hearing on January 14, 1993, is based on unfair labor practice charges filed by Nick Hernandez (Hernandez) against International Brotherhood of Painters and Allied Trades, Painters Local Union No. 1115, AFL–CIO (Respondent) in Case 32–CB–3829 on February 19, 1992, and in Case 32–CB–3869 on March 31, 1992. The Regional Director for Region 32 of the National Labor Relations Board (Board), on behalf of the Board's General Counsel, issued a complaint in Case 32–CB–3829 on March 31, 1992, and a complaint in Case 32–CB–3869 on May 8, 1992, and on May 20, 1992, issued an order consolidating these cases for hearing.

The complaint in Case 32–CB–3829 alleges that on January 22, 1992, the Respondent, which represents an appropriate unit of the employees employed by C & O Painting (Employer), caused the Employer to hire James Severn, in violation of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act), by engaging in this conduct for arbitrary, capricious, discriminatory, and invidious reasons, including but not limited to Severn's personal relationship with Respondent's hierarchy and notwithstanding that Severn was not entitled to a dispatch to the Employer under the terms of the Respondent's contract with the Employer and notwithstanding that the Employer did not request and did not seek the dispatch of Severn. Respondent filed an answer to the complaint denying the commission of the alleged unfair labor practices.

The complaint in Case 32–CB–3869 alleges that Respondent violated Section 8(b)(1)(A) of the Act when, on January 8, 1992, it filed internal union charges against Hernandez because he filed an unfair labor practice charge with the Board against Respondent, and alleges that in connection with the internal union charges, further violated Section 8(b)(1)(A) of the Act, by scheduling a trial, trying, judging, and imposing discipline on Hernandez because he filed an unfair labor practice charge with the Board against Respondent. Respondent filed an answer to the complaint denying the commission of the alleged unfair labor practices.[1]

On the entire record, and from my observation of the demeanor of the witnesses, and having considered the parties' posthearing briefs, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent Causes the Employer to Hire James Severn (Case 32–CB–3829)*

1. The evidence

Respondent, a labor organization with its office in Stockton, California, represents employees for purposes of collective bargaining, who perform painting and drywall work for their employers. Its business representative and financial secretary is George Juelch. He is also Respondent's hiring hall dispatcher.

The Employer is a construction industry painting contractor with its office in San Jose, California. During the time material, the Employer was performing a painting job on a site in Tracy, California (the Safeway job or Safeway jobsite). The Employer's foreman on the Safeway Job was Paul Rood. He was responsible for, among other things, the hiring of the painters and drywall workers employed by the Employer on the Safeway job.

[1] In its answers to the complaints, Respondent admits it is a labor organization within the meaning of Sec. 2(5) of the Act, and in its answers, as amended at the start of the hearing, admits that the Employer meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. I therefore find it will effectuate the policies of the Act for the Board to assert its jurisdiction in these cases.

During the time material, the Employer's painters and drywall workers employed within the Respondent's geographical jurisdiction, which encompassed the Safeway jobsite, were represented by the Respondent and covered by a collective-bargaining agreement between the Employer and the Respondent (the Agreement). The Agreement required that Respondent operate an exclusive hiring hall for the dispatch of employees to the Employer. More specifically, article III of the Agreement read, in pertinent part, as follows:

ARTICLE III

HIRING PRACTICES

Section A. Whenever an Employer requires workmen, he shall notify the office of the Union, either in person or by telephone, stating the number of workmen required, the type of work to be performed, the starting date of the job, and its approximate duration.

Section B. Upon receipt of such notice, the Union shall use its best efforts to furnish the required number of qualified and competent workmen. Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected to Union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of the Union memberships, policies, or requirements. Such selection will be on the following basis:

1. The Union shall maintain a list of all workmen seeking jobs who have been employed on the type of work and in the territory covered by this Agreement for a period of at least one (1) year, which list shall be hereinafter called ''List A.'' A separate list shall be maintained of all workmen seeking jobs who do not meet that requirement, which list shall be hereinafter called ''List B.''

2. Workmen's names shall be entered on said lists in the order in which they come to the Union's office seeking employment.

3. After each workmen's name there shall be entered a designation corresponding to the type or types of work which the workman is qualified to perform. Each workman, at the time of applying for a job, shall indicate his own qualifications for such type or types of work, and such indication shall be conclusive unless an Employer to whom such workman is dispatched reports to the Union that in his opinion the workman is not qualified. In such event, before he again will be entitled to preference hereunder, such workman shall be required to pass an objective examination given by a Qualifications Committee. Said Committee shall be selected by the Appropriate Painters Joints [sic] (????) Labor Management Committee and shall be composed of an equal number of representatives of the employer of the Union. Any employee, so rejected, who has worked on any such type or types of work for a period of more than one (1) year shall not be required to take such examination.

4. In dispatching workmen, preference shall be given to workmen on List A. Within each list, preference shall be given to those whose designations correspond to the type of work involved, in the order in which their names appear on the list. If there are not sufficient workmen on List A whose designations correspond to the type of work involved, preference shall be given to other workmen on said List in the order in which their names appear, and the same procedure shall be followed with List B should the names in List A be exhausted.

5. Whenever an Employer requests a particular workman by name, the Union will furnish said workman to such Employer, if available.

6. A Member will be allowed one (1) turndown for a job that he is qualified to do. His second turndown will drop him to the bottom of the list. If a person accepts a job, and it lasts less than five (5) days, he will not lose his spot on the out-of-work list. In order to maintain his spot on the out-of-work list, he must report to the Union Hall between 8:00 AM and 10:00 AM Monday mornings. Failure to do so without due cause will drop him to the bottom of the list.

Section C. Any workman who feels that he has not been dispatched in accordance with the provisions of this Article, may appeal to the Qualifications Committee, and the Committee shall have the power to reverse any decision of the Union with respect to dispatching. In any matter as to which the opinion of the Committee is less an unanimous, a workman dissatisfied with the opinion may appeal to any impartial umpire. The umpire shall be selected by the workman and the Union. If they cannot agree upon an umpire, he shall be selected by the State Conciliation Service of the Department of Industrial Relations of the State of California. The costs of any arbitration shall be borne equally by the workman and the Union. The decision of the arbitrator shall be final and binding.

Juelch, Respondent's business representative and hiring hall dispatcher, is responsible for the dispatch of employees from Respondent's hiring hall facility. He testified that the ''hiring practices'' set forth in article III of the Agreement are followed by the Respondent in dispatching employees to the Employer and to other employers who use the hiring hall facility.

There is nothing in the Agreement's ''hiring practices'' which precludes persons registered on the hiring hall's out-of-work list from soliciting their own jobs and it is common practice for registrants to solicit their own jobs, without objection by Respondent. Occasionally, in connection with the Safeway Job, after Rood had personally spoken to a registrant and decided he wanted to hire him, rather than ask Juelch to refer that registrant, Rood instructed the registrant to go to the Respondent's dispatch hall and to represent to Juelch that Rood had stated he wanted Juelch to refer the registrant to the Safeway Job. Juelch issued referrals to those registrants based solely on their representations or after verifying their representations.

James Severn, a member of Respondent, is its recording secretary and is the son of Respondent's president, Otto Severn. On Wednesday, January 15, 1992, while in Respondent's hiring hall facility performing his duties as recording secretary, Severn was advised by Juelch that he intended to drive out to the Safeway Job that day. Severn, a journeyman painter who was out of work, was registered on Respond-

ent's out-of-work list. He asked Juelch if it was okay if he accompanied him to the Safeway jobsite, explaining he was out of work and had tried to get on that job a couple of times before, without success. It is undisputed that Severn's object in accompanying Juelch to the Safeway jobsite was to solicit a job and that Juelch knew this was his intention, when he agreed to allow Severn on January 15 to accompany him to the jobsite.

On their arrival at the jobsite on January 15, Severn and Juelch, before entering the site, had to go into the office of the superintendent of the jobsite for the purpose of getting passes to enable them to get past the security gate. Juelch spoke to the secretary and told her Severn was a member of Respondent and they had business with Paul Rood, the Employer's foreman. The secretary knew that Juelch was the Respondent's business representative, and because of this she issued passes to both him and Severn. They then got back into Juelch's car and were allowed to enter the jobsite and drove to where the Employer was working.

Rood, a witness for the General Counsel, testified about Juelch's and Severn's January 15 visit to the Safeway Job, as follows: Rood was at work when Juelch and Severn visited him; Juelch jokingly commented that the work Rood was personally doing at that time was the type of work usually performed by an apprentice and they laughed about this; Juelch stated his reason for visiting the job was to inform Rood that Martin Luther King's birthday, Monday, January 20, was a holiday under the Agreement and because of this, if Rood worked anyone on Friday, January 17, or Monday, January 20, they would have to be paid at the overtime hourly rate of pay; after discussing this, Rood informed Juelch he had intended to telephone him because he needed a man for the next day, Thursday, January 16; at this time Juelch introduced Severn and informed Rood that Severn was a journeyman painter and was a good all-around painter who was looking for work; Severn told Rood he was unavailable for work on January 16 and would not be available until Tuesday, January 21, because he was going to Los Angeles to attend someone's 50th wedding anniversary; when Severn and Rood spoke to one another, Juelch remained in the immediate vicinity, within hearing distance, standing approximately 6 or 7 feet away; on being informed that Severn was unavailable for work on January 16, Rood again informed Juelch that he needed a painter for the next day; Juelch indicated he would act on Rood's request; Juelch and Rood then discussed, as they most always did when Juelch visited, the fact that there appeared to be a fair amount of painting work on the job, and, as he most always did when he visited, Juelch asked whether Rood was hiring workers to do this work, and Rood answered he would be hiring workers in the future as the work materialized; and, this concluded Juelch's and Severn's January 15 visit.

Juelch, a witness for Respondent, did not dispute Rood's version of what occurred on January 15, except that Juelch testified that as soon as Juelch introduced Severn to Rood, that Juelch left them alone and went to inspect one of the buildings where painting and drywall work was being performed and remained in that building for approximately 8 to 10 minutes and when he returned to where Severn and Rood were standing, they had finished their conversation.

Severn, a witness for Respondent, corroborated Juelch's above testimony that Juelch was not present when Rood spoke to Severn, and gave a completely different account of their conversation, than Rood. On direct examination, Severn testified he asked Rood if the Employer had any employment available and Rood told him, ''he was going to be putting on a couple of more men'' and asked if Severn could start work the next day; Severn told him he was not available because he was scheduled to leave for Los Angeles that day for a 50th wedding anniversary celebration and when Rood asked when he would be available for work, Severn replied he would be available the day after Martin Luther King's birthday, Tuesday, January 21, and Rood responded by stating, ''If he needed any men that he'd call me'' and stated he was going to be putting on a couple of men and ''would probably call for [Severn] next Tuesday or Wednesday.'' During cross-examination, when asked what Rood said to him after Juelch left the vicinity, Severn testified, ''He told me that he was planning to put on some more people and asked if I could start immediately and I told him that was difficult for me, like I said before,'' and further testified that the only other remark made to him by Rood during this conversation was, ''If [Rood] needed me that he'd call the hall.''

I credit Rood's above testimony describing Juelch's and Severn's January 15 visit and reject their testimony insofar as it differs from Rood's, because Rood was a completely disinterested witness, who had absolutely no reason to tailor his testimony to suit either the General Counsel's or Respondent's case, and when he gave this testimony his testimonial demeanor—the way he spoke, the tone of his voice, and the way he looked and acted while testifying—led me to conclude that he was a sincere and conscientious witness, whereas the testimonial demeanor of both Juelch and Severn was not good. Also, in view of Rood's excellent testimonial demeanor and the straightforward and unhesitant way in which he gave his testimony, I am persuaded this is not a case where the passage of time has sufficiently dulled Rood's memory, so that despite his obvious sincerity he is an unreliable witness.

Juelch and Severn testified that on January 15, after their visit to the Safeway Job, while in Juelch's automobile driving back to Respondent's office, they spoke about Severn's conversation with Rood. Severn testified he told Juelch that Rood had asked if Severn could go to work for the Employer the next day and that he had refused the job offer because of a previous arrangement, but also advised Juelch that Rood ''might call for me.'' Juelch, when asked to narrate what Severn told him about his conversation with Rood, testified: ''He kind of liked [Rood's] attitude, he'd probably like to go to work for him. And he'd be calling, when he needed men. He'd be calling for [Severn]. That is what [Severn] told me that the conversation was about.''

As I have found, supra, Rood did not expressly or by implication indicate to Severn that when the Employer in the future needed painters for the Safeway Job that he intended to call the Respondent's hiring hall and ask for him by name. It is for this reason, and because of their poor testimonial demeanor, that I reject Severn's testimony that he told Juelch that Rood ''might call for me'' and reject Juelch's testimony that Severn told him that Rood had told Severn that when he needed men he would be calling for Severn. Likewise, I reject Respondent's contention that ''as far as the record is concerned there is nothing to contradict Mr. Severn's testimony that he left the Tracy jobsite believing that a commit-

ment had been made to hire him and that he had relayed that to Mr. Juelch.''

On Tuesday, January 21, during the regular Tuesday morning meeting with the representative of the general contractor for the Safeway Job, Rood was informed that the general contractor expected the Employer to finish certain painting work by a stated date, which meant that Rood would have to hire two more painters in order to complete the work by the stated deadline.

On the morning of January 21, after his meeting with the general contractor's representative, Rood telephoned Respondent's hiring hall facility and asked Juelch to dispatch two painters to the Safeway Job. Rood and Juelch gave conflicting testimony about this conversation. Their testimony is set out and evaluated hereinafter.

Rood testified: he told Juelch he needed two painters for the following day for the Safeway Job; he stated he would like Juelch to dispatch one man who had been out to the jobsite several times and who had been recommended to Rood and whose first name was ''Ron''; Juelch asked whether Rood was referring to Ron Wheeler; Rood told him that Wheeler was the person he was talking about and that besides Wheeler he needed another painter; Juelch stated he would take care of Rood's request; and this ended the conversation. Rood testified there was no discussion about who Juelch intended to dispatch as the second painter, and that on this subject Juelch only said he would take care of Rood's request. Rood also testified he did not ask Juelch to dispatch Severn to the job nor was Severn's name mentioned by either Juelch or Rood.

Juelch testified that when Rood telephoned him on January 21, Rood did not ask for Wheeler by name, first name or last name, but simply asked that Juelch dispatch two painters to the Safeway Job. When questioned by the General Counsel about this conversation, at the start of the hearing, as an adverse witness, Juelch testified he responded to Rood's request for two painters by saying to Rood, ''I assume that you mean the two guys that's been on the jobsite that has spoken with you,'' and Rood answered, ''yeah,'' and Juelch named Wheeler and Severn, and Rood responded, ''great send them out.'' Later, during the hearing, when questioned by Respondent's counsel about this conversation, Juelch testified he replied to Rood's request for two painters by asking, ''how about the two fellows you've already kind of promised the job to'' or ''kind of talked to and kind of spoke of putting to work,'' and named Ron Wheeler and Jim Severn, and Rood responded by saying, ''that's fine,'' and this ended the conversation.

Juelch at one point in his testimony volunteered that although Rood on January 21, when he asked Juelch to dispatch two painters, did not ask for Wheeler by name, that Rood previously had indicated to Juelch, when they had met at the jobsite, that he wanted Juelch to dispatch Wheeler to the job when, in the future, he asked Juelch to dispatch painters to the job. However, his testimony about what Rood said to him on the subject during this prior conversation significantly contains no mention of Wheeler's name. He testified that Rood had told him, ''when I get ready to put some folks on . . . it'll probably be the guys that's been coming out here to the jobsite. That I had spoken to.'' Juelch did not testify that Rood at that time or at any other time named Wheeler as having been one of the ''guys'' that had visited him on the job and there is no credible evidence that Rood, prior to January 21, ever gave Juelch reason to believe he desired to hire Wheeler when the need for more painters on the job materialized.

Ron Wheeler is a member of Respondent, who on several occasions prior to January 21, personally visited the Safeway Job and solicited Rood for a job. It is undisputed that on January 21, when Rood telephoned Juelch, Wheeler was in Respondent's dispatch office and when Juelch answered the phone Wheeler left the office, but was immediately called back into the office by Juelch, when he learned Rood was requesting that Wheeler be dispatched the next day to the Safeway Job. Wheeler testified that when he returned to the office he heard Juelch say to whomever he was speaking to on the telephone, that Wheeler was in the office and asked if it was okay to dispatch Wheeler to the job with either ''another'' or ''other'' painter. Wheeler further testified that during the period of time he was in the office, while Juelch was speaking on the telephone, Juelch did not mention Severn's name and after Juelch finished talking on the telephone and had given him a referral slip dispatching him to the Safeway Job, that Wheeler asked Juelch who else Juelch intended to dispatch to the Safeway Job, and Juelch, without looking at the out-of-work register, answered he believed the next person on the out-of-work register was Albert Hu. Juelch, on the other hand, testified that Wheeler did not ask him who else was going to be dispatched with him to the Safeway Job, and also testified that there was no ''discussion about Albert Hu'' with Wheeler.[2]

I credit Rood's testimony describing his January 21 telephone conversation with Juelch for the same reasons I relied on previously in this decision to credit his testimony describing what occurred on January 15, when Juelch and Severn visited with him at the Safeway Job. In addition, Rood's testimony that Juelch did not mention Severn's name was corroborated by the credible testimony of Wheeler that when Juelch was speaking to Rood, while Wheeler was in Juelch's office, Juelch did not mention Severn's name and that subsequently, when Wheeler asked Juelch who, besides Wheeler, he intended to dispatch to the Safeway Job on January 22, that Juelch did not mention Severn's name, but stated he thought that the next person on the out-of-work list was Albert Hu.[3]

On January 21, besides issuing a referral slip to Wheeler authorizing his employment on January 22 by the Employer on the Safeway Job, Juelch issued a similar referral slip to Severn. Wheeler and Severn went to the Safeway Job on

[2] Hu is a member of Respondent whose name on January 21 was on the Respondent's out-of-work register. Juelch testified Hu was employed by employers primarily as a shipyard painter. It is undisputed, however, that Hu was a journeyman painter who was qualified to do all the work normally performed by a journeyman except for residential work, which is not the type of work involved on the Safeway Job.

[3] I considered that Wheeler campaigned for union office with Charging Party Hernandez and represented Hernandez at the trial held by Respondent concerning the internal union charges filed by Juelch against Hernandez, and that in view of these circumstances, it is a fair inference that when Wheeler testified in this proceeding he was not an unbiased witness, but was probably biased in favor of the position of Hernandez, who filed the charge in this case. Nonetheless I credited his testimony because his testimonial demeanor was better than Juelch's.

January 22 and were hired by Rood as painters, pursuant to the referral slips issued by Juelch.

Juelch testified the reason he dispatched Severn to the Safeway Job on January 22 was that Severn had been requested by Rood by name. He testified Severn would not have been dispatched on January 22 to the Safeway Job if Rood, in their January 21 telephone conversation, had not indicated he wanted Severn. Instead, Juelch testified he would have dispatched the person next eligible for dispatch on Respondent's out-of-work list, and further testified that in view of Severn's position on that list, Severn would not have been that person.

2. Discussion and conclusions

The complaint, in substance, alleges Respondent violated Section 8(b)(1)(A) and (2) of the Act when, on January 22, 1992, Respondent's exclusive hiring hall dispatched James Severn to the Employer's Safeway Job, even though another employee-applicant was entitled to that dispatch under the terms of Respondent's collective-bargaining agreement with the Employer. I find this allegation has merit because the record establishes that Respondent's January 22 referral of Severn was unlawfully motivated and, even if it was not unlawfully motivated, Respondent's referral of Severn violated the Act, as alleged, because Severn's referral was an arbitrary departure from the contractual hiring practices provision which affected the employment of another employee. My basis for these conclusions are as follows.[4]

1. Juelch, Respondent's hiring hall dispatcher and its business representative, dispatched Severn to the Employer's Safeway Job on January 22, even though Severn was not next in order for referral on the hiring hall's out-of-work list, and even though the Employer had not requested him by name. By referring Severn out of order, even though the Employer had not requested him by name, Juelch acted in derogation of the explicit and unambiguous hiring procedures contained in the contract between the Respondent and the Employer, which obligated Juelch to refer to the Employer's Safeway Job on January 22 the applicant next in order on the out-of-work list, rather than Severn. Juelch, who normally complied with the contractual hiring hall practices provision, when referring employee-applicants to employers, gave a false reason for referring Severn out of order in violation of the contractual hiring practices provision. For, as discussed supra, I discredited his testimony that the Employer's job foreman requested Severn by name and that because of this he referred Severn to the Employer on January 22, rather than the most senior qualified available person on the out-of-work list.

Also relevant in evaluating Juelch's motive for referring Severn out of order, is that Severn, like Juelch, was an official of Respondent, its recording secretary, and 1 week prior to the January 22 referral, Juelch had allowed Severn to accompany him to the Employer's Safeway jobsite for the purpose of soliciting a job with the Employer and introduced and recommended him to the Employer's job foreman.

Considering that when Juelch referred Severn out of order to the Employer's Safeway Job on January 22 that he deviated from the hiring procedures set forth in contractual hiring practices provision, which he normally followed; considering the reason advanced by Juelch for referring Severn out of order was false; considering Severn is an officer of Respondent; and, considering that 1 week before Juelch's out-of-order referral of Severn, he allowed Severn to accompany him to the Employer's Safeway jobsite for the purpose of soliciting a job with the Employer and introduced and recommended him to the Employer's job foreman; these circumstances, in their totality, establish that Severn's position with Respondent was a motivating factor in Juelch's decision to refer him out of order to the Safeway Job on January 22.[5] Since Respondent failed to establish that even absent Severn's position with the Respondent, that Respondent would have referred him out of order to the Safeway Job, at the expense of another employee-applicant, I further find that in view of the above circumstances, the General Counsel has established Respondent violated Section 8(b)(1)(A) and (2) of the Act by referring Severn out of order on January 22 to the Employer's Safeway Job because Severn occupied the position of Respondent's recording secretary.

2. Alternatively, even if Severn's out-of-order referral by Respondent to the Employer's Safeway Job was not unlawfully motivated, I find it constituted an arbitrary departure by Respondent from the established contractual hiring procedures which Respondent was legally obligated to follow, and that by deviating from those procedures, when it referred Severn to the Employer's Safeway Job out of order, Respondent breached its duty of fair representation in violation of Section 8(b)(1)(A) and (2) of the Act.

The Board has held that a union, like Respondent, which operates an exclusive hiring hall must represent all individuals who seek to use the hall fairly and impartially. The labor organization conducting such an operation has a duty to conform with and apply lawful contractual standards in administering the referral system. As the Board stated in *Operating Engineers Local 406*, 262 NLRB 5051 (1982), enfd. 701 F.2d 504 (5th Cir. 1983):

> [A]ny departure from established hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union security clause or was necessary to the effective performance of its representative function.

[4] Respondent asserts that this case should be deferred for action under the hiring hall grievance/arbitration provision of the collective-bargaining agreement between Respondent and the Employer. I find that deferral is not appropriate here, where the charges have been filed by an individual, the interests of the individual are adverse to those of the Respondent, and the Employer is not a party to the Board proceeding. *Iron Workers Local 377 (M.S.B, Inc.)*, 299 NLRB 680 fn. 1 (1990). See also *Laborers Northern California Council (Baker Co.)*, 275 NLRB 278, 287–288 (1985).

[5] In analyzing Respondent's motivation for referring Severn out of order to the Safeway Job on January 22, which resulted in the loss of employment for the employee-applicant next in order on the out-of-work list, I have been guided by the Board's decision in *Wright Line*, 215 NLRB 1083 (1980). See *Service Employees Local 9 (American Maintenance)*, 303 NLRB 735 (1991), and cases cited therein.

Accord: *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808 (1992).

As described supra, Respondent's contract with the Employer contains explicit and unambiguous standards for dispatching job applicants. In this regard, article III requires Respondent to register job applicants on an out-of-work list, and then refer the applicants on the out-of-work list, on a first-in, first-out basis, except in those instances where the Employer requests a particular applicant by name, then Respondent must furnish the applicant to the Employer, if available.

In spite of these clear contractual standards, Respondent's business representative Juelch, referred Severn to the Employer's Safeway Job on January 22 , even though the Employer had not asked for him by name and even though there were other qualified applicants ahead of him on the out-of-work list. In this last respect, Severn's out-of-order referral on January 22 affected the employment of the applicant ahead of him on the out-of-work list, who would have been referred to the Employer's Safeway Job, if Juelch had complied with the contractual hiring procedure. In other words, the above circumstances demonstrate that the General Counsel has made a prima facie showing that Respondent unlawfully departed from its established hiring hall rules by referring Severn out of order to the Employer's Safeway Job on January 22 and that its conduct affected the employment of an applicant ahead of him on the out-of-work list, who would have been referred on January 22 to the Safeway Job, instead of Severn, during the normal course of business. Since Juelch's asserted reason for referring Severn to the Employer's Safeway Job out of order has been discredited, the General Counsel's prima facie case stands unrebutted.[6] Therefore, I find that in referring Severn to the Employer's Safeway Job on January 22, in derogation of the established hiring hall rules, Respondent breached its duty of fair representation in violation of Section 8(b)(2) and (1)(A) of the Act.

B. *Respondent Disciplines Hernandez for Filing an Unfair Labor Practice Charge Against Respondent (Case 32–CB–3869)*

1. The evidence

On October 21, 1991, Charging Party Hernandez, a member of Respondent, filed an unfair labor practice charge with the Board's Regional Office, which was docketed as Case 32–CB–3754, alleging Respondent violated the Act by denying Hernandez, ''the opportunity to be dispatched through its hiring hall because of his opposition to incumbent Union officers.''

On December 11, 1991, the Regional Director of the Board's Regional Office notified Hernandez and Respondent that he was refusing to issue a complaint in the matter of Hernandez' above-described unfair labor practice charge because his investigation did not establish that Respondent failed to dispatch Hernandez in retaliation for his running against the current union officers. Hernandez did not appeal the Regional Director's dismissal of his charge.

On or about January 8, 1992, Respondent, acting through George Juelch, its business representative, filed internal union charges against Hernandez. The internal union charges filed by Juelch allege, in substance, that by filing his unfair labor practice charge in Case 32–CB–3754 against Respondent, Hernandez violated Respondent's bylaws and several sections of the constitution of Respondent's International Union, because: the unfair labor practice charge was not filed by Hernandez in good faith; by filing the unfair labor practice charge, Hernandez did not follow proper procedures for exhausting his remedies within the Union; and, by filing the unfair labor practice charge, Hernandez interfered with the performance of the duties of Respondent's officers and representatives.

On or about February 21, 1992, Respondent, acting through its recording secretary, James Severn, by letter, notified Hernandez that a trial board of Respondent would hold a hearing on the above-described internal union charges on March 10, 1992.

On March 10, 1992, a trial board of the Respondent heard the internal union charges filed by Juelch against Hernandez and found Hernandez guilty ''as charged,'' and disciplined Hernandez, as follows: fined him $200 of which $100 was held in abeyance; and, disqualified him for nomination for any office or committee of Respondent for a period of 3 years from March 10, 1992.

Juelch, the person who filed the internal union charges against Hernandez, presented them to the trial board. The minutes of the trial (G.C. Exh. 6) reveal that, in presenting the charges to the trial board, Juelch stated: ''These charges were not filed for Brother Nick Hernandez going to the NLRB but for filing charges not preferred in good faith, with no merit and for not following proper procedure as per International Brotherhood Constitution and Local No. 1115 By-Laws.'' However, there is no evidence whatsoever that the unfair labor practice charge filed by Hernandez against Respondent in Case 32–CB–3754 was not filed by him in good faith.

On or about March 18, 1992, Respondent, acting through its president, Otto Severn, by letter, notified Hernandez of the findings and discipline of the trial board, described above, and of his right to appeal those findings and discipline to the Respondent's parent organization, the International Brotherhood of Painters and Allied Trades.

Hernandez filed such an appeal. In addition, on March 31, 1992, he filed the unfair labor practice charge in this case. The complaint in this case issued May 8, 1992.

By letter to Hernandez and Respondent dated August 14, 1992, the International Union's general executive board through the International Union's general secretary-treasurer notified them that the decision of the Respondent's trial board in the matter of Juelch's charges against Hernandez had been reversed. The August 14 letter reads as follows:

> During its August 1992 meeting, the General Executive Board considered the appeal of Brother Nick Hernandez of Local Union 115, Stockton, California, from the action of the Trial Board of that Local Union fining him $200.00, $100.00 to be held in abeyance, and pro-

[6] As discussed supra, I discredited Juelch's testimony that the Employer's job foreman requested Severn by name and that because of this Juelch referred Severn to the Employer on January 22, rather than giving preference to the applicants registered on the out-of-work list in the order in which their names appeared on the list.

> hibiting him from running for office or a committee for three years.
>
> As the trial board minutes make clear, the basis for the union charges was an unfair labor practice charge filed by the charged party against the Local Union with the National Labor Relations Board. The decision by the Trial Board was understandable, as it is always the preferred Union policy to keep complaints and protests inside the organization, utilizing procedures provided by the General Constitution and Local Union bylaws.
>
> However, it is against public policy and the National Labor Relations Act to discipline a member for filing unfair labor practice charges with the National Labor Relations Board. On that ground, and to assist the Local Union to avoid legal difficulties, the General Executive Board reverses the decision of the Trial Board.
>
> Any appeal to the General Convention from this decision must be filed within 30 days pursuant to Section 273 of the Constitution.

Respondent did not appeal from the decision of the International Union's general executive board. It rescinded the discipline imposed on Hernandez by its trial committee and reimbursed him for the $100 fine he had paid to Respondent.

The record establishes that the internal union charges filed against Hernandez by Juelch were read to Respondent's members at a membership meeting and that the trial committee's decision which issued in connection with those charges were likewise read to the members at a membership meeting. However, as of the date of the hearing in this case, January 14, 1993, the Respondent's members had not been informed by Respondent that the International Union's general executive board had reversed the trial board's decision or that Respondent, in conformance with the instruction of the International Union's general executive board, had rescinded the discipline imposed on Hernandez by the trial board.

2. Discussion and conclusions

A union violates Section 8(b)(1)(A) of the Act by taking coercive action against a member for filing an unfair labor practice charge against it with the Board without first having exhausted his intraunion remedies. *NLRB v. Shipbuilders*, 391 U.S. 418 (1968). In *Shipbuilders* the Supreme Court sustained the Board's finding that a union's expulsion of an employee-member for filing an unfair labor practice charge against the union was coercive under Section 8(b)(1)(A). Other types of coercive conduct interdicted by Section 8(b)(1)(A), include the filing of internal union charges against an employee-member for filing an unfair labor practice charge with the Board against a union, and the scheduling of a trial, the trial itself, and the discipline imposed on the employee-member in connection with the filing of those internal union charges. See generally *Laborers Northern California Council (Baker Co.)*, supra, and cases cited there.

Here, the uncontradicted evidence, as set forth in detail supra, establishes that on or about January 8, 1992, Respondent's business representative Juelch, on Respondent's behalf, filed internal union charges against employee-member Hernandez because he had filed an unfair labor practice charge with the Board against Respondent without first having exhausted his intraunion remedies, and further establishes that in connection with the aforesaid internal union charges, Respondent scheduled a trial, tried, judged, and imposed discipline on Hernandez because he had filed an unfair labor practice charge with the Board against Respondent without first having exhausted his intraunion remedies.

I find, based on the principles set forth above, that Respondent violated Section 8(b)(1)(A) of the Act by filing internal union charges against Hernandez because he had filed an unfair labor practice charge with the Board against it without first having exhausted his intraunion remedies, and by scheduling a trial, trying, judging, and imposing discipline on Hernandez because he had filed an unfair labor practice charge against Respondent with the Board without first having exhausted his intraunion remedies.

Respondent's defense is that it would not effectuate the policies of the Act for the Board to issue a remedial order because Charging Party Hernandez has taken advantage of the intraunion procedure available for him to appeal Respondent's discipline of him and has successfully used this procedure to have his discipline rescinded. Assuming that under certain circumstances, it would effectuate the policies of the Act for the Board, in a case such as this involving the unlawful discipline of an employee-member by a union, to defer to the union's intraunion procedures, when the employee-member has successfully used those procedures to have his discipline rescinded, this is not such a case. For, while the International Union and Respondent have notified Hernandez that his discipline has been rescinded, and the International Union has informed Hernandez that ''it is against public policy and the National Labor Relations Act to discipline a member for filing unfair labor practices with the National Labor Relations Board,'' neither Respondent nor its International Union has made the requisite assurances to Hernandez or to Respondent's other members regarding their exercise of the Section 7 right involved. In this last regard, as I have found supra, the information that Respondent had charged, tried, and disciplined Hernandez for having filed an unfair labor practice charge with the Board against Respondent was disseminated by Respondent to its members, yet its members have not been notified that Hernandez' discipline has been rescinded and have not been notified that Respondent repudiates its unlawful conduct and will not engage in such conduct in the future. It is for these reasons, and because of the untimeliness of Respondent's rescission of Hernandez' discipline coming more than 4-1/2 months after Hernandez filed the charge in this case and more than 3 months after the issuance of the complaint in this case, that I reject Respondent's contention that since it has already rescinded the unlawful discipline imposed on Hernandez that this was sufficient to remedy Respondent's unfair labor practice.[7]

[7] As I indicated during the hearing, I am of the view that Respondent's above-described defense to the unfair labor practice, amounts to a contention that Respondent's rescission of the unlawful discipline constitutes a repudiation of the unlawful conduct sufficient to remedy the violation and makes it unnecessary for the Board to issue a remedial order. For the reasons set forth above, and guided by the standards for an appropriate repudiation of unfair labor practices set forth in *Passavant Memorial Hospital*, 237 NLRB 138 (1978), I conclude Respondent's rescission of Hernandez' discipline was ineffective to relieve Respondent of liability and to obviate the need for further remedial action.

CONCLUSIONS OF LAW

1. By referring James Severn to the Employer's Safeway Job on January 22, 1992, ahead of other employee-applicants registered on the Respondent's out-of-work list, because Severn was an officer of the Respondent and in derogation of the hiring practices provision of the Respondent's collective-bargaining agreement with the Employer, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

2. By filing internal union charges against employee-member Nick Hernandez on or about January 8, 1992, and by scheduling a trial, trying, and disciplining him in connection with those charges, because he filed an unfair labor practice charge with the Board against Respondent, Respondent violated Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found that Respondent has engaged in the aforesaid unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action which will effectuate the purposes of the Act.

Having found that Respondent violated the Act by unlawfully referring James Severn to the Employer's Safeway Job on January 22, 1992, ahead of other employee-applicants registered on Respondent's out-of-work list, because Severn was an officer of the Respondent and in derogation of the hiring practices provision contained in Respondent's collective-bargaining agreement with the Employer, and having found that absent Respondent's unlawful referral of Severn that Respondent would have referred another employee-applicant registered on its out-of-work list to the Employer's Safeway Job on January 22, 1992, instead of Severn,[8] I shall recommend that this registrant, whose identity shall be determined during the compliance stage of this proceeding, be reimbursed for any loss of earnings and benefits suffered as the result of the Respondent's unlawful referral of Severn. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To remedy Respondent's unlawful out-of-order referral of Severn, the General Counsel seeks an order requiring Respondent, among other things, to: (1) Keep and retain for a period of 2 years from the date of this decision permanent written records of its hiring and referral operations which will be adequate to disclose fully the basis on which each referral is made and, on the request of the Regional Director or his agents, make available for inspection, at all reasonable times, any records relating in any way to the hiring and referral system; and (2) place the referral register, for a period of 2 years, in a convenient place in the hiring hall for easy access and inspection by work applicants, as a matter of right, on the completion of each day's entries in such registers. I considered the General Counsel's arguments raised in support of this remedy and I am of the view that it is not called for by the circumstances of this case. There is no evidence that when it unlawfully referred Severn out of order to the Employer's Safeway Job on January 22, 1992, that Respondent was acting pursuant to a policy of referring hiring hall registrants out of order, in derogation of the established hiring hall rules, or was acting pursuant to a policy of granting preference to hiring hall registrants who are officials of Respondent. Insofar as this record is concerned, all that is involved in this case is a single instance of an illegal out-of-order referral, which was not part of a more widespread policy. Under the circumstances, the remedy requested by the General Counsel is not warranted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, International Brotherhood of Painters and Allied Trades, Painters Local Union No. 1115, AFL–CIO, Stockton, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to refer applicants for employment registered on the out-of-work list maintained by Respondent's exclusive hiring hall, in accordance with its established hiring hall practices and procedures.

(b) Giving preference to applicants who occupy positions with Respondent, because they occupy positions with Respondent when, in the operation of its exclusive hiring hall, it refers applicants to jobs.

(c) Filing internal union charges against employee-members for filing unfair labor practice charges against Respondent with the Board and from scheduling for trial, trying, judging, and disciplining employee-members for filing unfair labor practice charges against Respondent with the Board.

(d) In any like or related manner restraining or coercing employees, members, or job applicants, in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the employee-applicant who would have been referred by Respondent to the Employer's Safeway Job on January 22, 1992, for the loss of earnings and benefits suffered as the result of the Respondent's unlawful referral of James Severn to that job, with backpay to be computed in the manner set forth in the remedy section of this decision.

(b) Rescind the discipline Respondent imposed on Nick Hernandez for filing an unfair labor practice charge against Respondent with the Board and remove from its files any reference to that discipline and notify Hernandez, in writing, that it has done so and will not use this discipline, or his fil-

[8] Respondent's contention that ''[t]here is no evidence that anyone other than Mr. Severn would have been referred,'' has no merit. As I have found supra, the Employer's Safeway Job foreman Rood, on January 21 requested Juelch to refer two painters to the job on January 22 and called for one of the two by name (Wheeler), but did not request a particular painter by name to fill the second job opening. Therefore, absent Juelch's unlawful out-of-order referral of Severn to fill that opening, it is clear that pursuant to the established contractual hiring hall rules, which he usually followed, that Juelch would have complied with Rood's request for an unnamed painter by referring the next qualified available registrant whose turn it was to be referred from the out-of-work list.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ing of the unfair labor practice charge, against him in any way.

(c) Post at its business office, hiring hall, and meeting places, or any places where it customarily posts notices to its members copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Additional copies of the attached notice marked ''Appendix'' shall be signed by an authorized representative of the Respondent and forthwith returned to the Regional Director for Region 32 for posting by the Employer, it being willing.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to refer applicants for employment registered on our exclusive hiring hall's out-of-work list, in accordance with our established hiring hall practices and procedures.

WE WILL NOT give preference to applicants who occupy a position in this Union because they occupy such a position, when, in the operation of our exclusive hiring hall we refer applicants to jobs.

WE WILL NOT file internal union charges against our employee-members for filing an unfair labor practice charge against us with the National Labor Relations Board and WE WILL NOT schedule for trial, try, judge, or discipline our employee-members for filing an unfair labor practice charge against us with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce employees, members, or job applicants, in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole the employee-applicant who would have been referred by us to C & O Painting's Safeway Job in Tracy, California, on January 22, 1992, for the loss of earnings and benefits suffered as the result of our unlawful referral of James Severn to that job, with interest.

WE WILL rescind the discipline we imposed on Nick Hernandez for filing an unfair labor practice charge against us with the National Labor Relations Board and remove from our files any reference of that discipline and notify Hernandez, in writing, that we have done so and that we will not use this discipline, or his filing of the unfair labor practice charge, against him in any way.

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, PAINTERS LOCAL UNION NO. 1115, AFL–CIO